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## The status of laws on outlaw motorcycle gangs in Australia

Second edition

Lorana Bartels



Criminology  
Research  
Council

This paper sets out the laws in Australia governing organised crime and, in particular, outlaw motorcycle gangs (OMCGs). It presents an overview of each jurisdiction's current and proposed legislative framework, as well as proposals to coordinate legislative responses.

Table 1 sets out the key legislative provisions currently in force in respect of OMCGs.

**Table 1** Current legislative provisions on OMCGs

Jurisdiction	Legislation
South Australia	<i>Statutes Amendment (Anti-Fortification) Act 2003</i>
	<i>Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005</i>
	<i>Statutes Amendment (Power to Bar) Act 2008</i>
	<i>Serious and Organised Crime (Control) Act 2008</i>
New South Wales	<i>Crimes Legislation Amendment (Gangs) Act 2006</i>
	<i>Crimes (Criminal Organisations Control) Act 2009</i>
Western Australia	<i>Corruption and Crime Commission Act 2003</i>
Queensland	<i>Criminal Proceeds Confiscation Act 2002</i>
	<i>Police Powers and Responsibilities Act 2000</i>
Victoria	<i>Crimes (Assumed Identities) Act 2004</i>
	<i>Crimes (Controlled Operations) Act 2004</i>
	<i>Evidence (Witness Identity Protection) Act 2004</i>
	<i>Major Crimes (Investigative Powers) Act 2004</i>
	<i>Surveillance Devices (Amendment) Act 2004</i>
Tasmania	<i>Police Offences Amendment Act 2007</i>
Northern Territory	<i>Justice Legislation (Group Criminal Activities) Act 2006</i>
	<i>Serious Crime Control Act 2009</i>
Australian Capital Territory	<i>Crimes (Controlled Operations) Act 2008</i>
	<i>Crimes (Assumed Identities) Act 2009</i>

## Jurisdictional responses

### South Australia

In 2003, South Australia passed the *Statutes Amendment (Anti-Fortification) Act 2003* which seeks 'to prevent the construction of outlaw motorcycle gang headquarters in South Australia and also to allow police to demolish the existing fortifications when they are excessive' (Atkinson 2003: 3557).

In May 2008, South Australia passed what Premier Mike Rann proclaimed as 'the world's toughest anti-bikie laws' (Rann 2008: np), with the introduction of the *Serious and Organised Crime (Control) Act 2008*, which came into effect on 4 September 2008. The Premier cited the following as highlights of the Act:

- gang members who engage in acts of violence that threaten and intimidate the public will be guilty of serious offences and will find it harder to get bail;

- police will be able to prohibit members of a bikie gang from attending a place, event or area where this would pose a serious threat to the public;
- the old law of consorting will be replaced with a new law of criminal association that prohibits telephone calls as well as meetings in the flesh;
- stalking a person with the intention of intimidating a victim, witness, court official, police officer or public servant will become a serious offence;
- it will be easier for police to secure orders to dismantle fortifications protecting gang clubrooms; and
- in addition, the legislation created new offences of violent disorder (maximum penalty of 2 years jail); riot (7 years, 10 years where aggravated); affray (3 years, 5 years where aggravated) and stalking of public officials by OMCG members (7 years; Rann 2008).

Under the Act, the Attorney-General may declare an organisation an outlaw organisation if satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order (s 10(1)).

In considering whether to make a declaration, the Attorney-General may have regard to any of the following:

- any information suggesting that a link exists between the organisation and serious criminal activity;
- any criminal convictions recorded in relation to current or former members of the organisation, or persons who associate, or have associated, with members of the organisation;
- any information suggesting that current or former members of the organisation, or persons who associate, or have associated, with members of the organisation, have been, or are involved in, serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions);
- any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;
- any submissions received from members of the public in relation to the application; and
- any other matter the Attorney-General considers relevant (s 10(3)).

The Attorney-General is not required to provide any grounds or reasons for a declaration or decision, nor is criminal intelligence information provided by the Commissioner of Police to be disclosed (s 13).

Under s 14(1), the court must, on application by the Commissioner, make a control order against a person if the court is satisfied that the person is a member of a declared organisation. In addition, the court may make such an order if satisfied that:

- the person has been a member of an organisation which, at the time of the application, is a declared organisation, or engages, or has engaged in serious criminal activity and regularly associates with members of a declared organisation; or
- engages, or has engaged, in serious criminal activity and regularly associates with other persons who engage, or have engaged, in serious criminal activity; and
- the making of the order is appropriate in the circumstances (s 14(2)).

If a control order is made and the defendant is a member of a declared organisation, the order must prohibit the person from associating with other persons who are members of declared organisations, or prohibit a dangerous article or weapon (s 14(5)(b)).

The maximum penalty for contravening or failing to comply with a control order is five years' imprisonment (s 22). The offence of criminal association also attracts a penalty of five years (s 35). A person is guilty of such an offence if they associate, on not less than six occasions during a period of 12 months, with a person who is a member of a declared organisation or the subject of a control order, or by email or other electronic means. Associating includes communication by letter, telephone or facsimile (s 35(11)(a)). Certain forms of association are excluded, for example, between close family members or associations occurring in the course of lawful occupation or training (s 35(6)).

Under Part 4 of the Act, a senior police officer has the power to make a public safety order, whereby a person may be prohibited from being at specified premises or attending a specified event. Section 37 provides for an annual review by a retired judicial officer. The report for the 2008–09 financial year was tabled in Parliament in October 2009. Section 38 provides for a review by the Attorney-General after four years, while s 39 provides that the Act is to expire after five years, in September 2013.

On 16 December 2008, the Attorney-General, Michael Atkinson, received an application from the Police Commissioner to declare the Finks Motorcycle Club under the Act. On 24 March 2009, he advised that he would invite the Commissioner to comment on the submissions he had received on behalf of the Finks and observed that the making of the declaration 'is not a foregone conclusion' (Atkinson 2009a: 2). On 14 May 2009, the Attorney-General made a declaration pursuant to s 10(1) of the Act in respect of the Finks

Motorcycle Club and his detailed reasons for making that declaration were subsequently made publicly available (see Atkinson 2009c). In making the declaration, Mr Atkinson determined that:

The Finks are an organisation whose members associate for the purpose of organising, planning, facilitating, supporting and engaging in serious criminal activity. The Finks Motorcycle Club is a risk to public safety and order in the State of South Australia (Atkinson 2009b: 2).

It should also be noted that South Australia Police has developed a Serious Organised Crime Strategy, to run from 2009 to 2012, including the following key principles:

- harm to the community will be reduced by disabling serious organised crime operations;
- disabling serious organised crime will be primarily achieved through increasing the cost and risk to criminal enterprises and individuals;
- police operations will be based on knowledge and intelligence;
- operations will be justified by a target selection model and will be continuously assessed;
- operational tactics will combine traditional and innovative approaches;
- operational outcomes will be enhanced by engaging staff across [SA Police] and forming partnerships at local and national levels; and
- active measures will be taken to improve operational capability (South Australia Police 2009: 8).

On 25 March 2009, South Australia proposed strengthening the provisions of the Act. The proposal would create a new offence of participating in, or contributing to, a criminal organisation's activities and make it an offence for members of an organised criminal group to instruct others to commit offences for the benefit of, at the direction of, or in association with the criminal organisation. Mutual recognition of laws in other jurisdictions would also be introduced, enabling the Attorney-General to ban a chapter of a gang in South Australia if it exists or relocates there and is banned interstate (Owen & Edwards 2009).

On 28 May, it was reported that control orders had been granted against two members of the Finks OMCG ('SA Democrats MP challenges bikies law' *The Age* 2009); by 10 June, eight Finks members had been subject to such orders. These eight orders were stayed and a magistrate hearing an application in respect of a further two Finks members refused to impose the orders, pending the outcome of a Supreme Court challenge to the validity of the legislation (Fewster 2009a). When granting the first control order under the legislation, the Chief Magistrate issued a memo that media not be allowed to inspect the criminal records

of alleged offenders (Dowdell 2009a). At that time, the Premier told the media that 'there will be a lot more to come' ('More Finks bikies facing control orders' *Sydney Morning Herald* 26 May 2009).

In July 2009, it was reported that some magistrates were refusing to issue further control orders, pending the results of a Supreme Court challenge to the validity of the legislation (Fewster 2009b). On 25 September, the Supreme Court handed down its decision in *Totani and Another v The State of South Australia* [2009] SASC 301 (Totani's case). A majority of the Court declared s 14(1), which provides that the Court must make a control order against a person if the court is satisfied that the person is a member of a declared organisation, to be invalid. Bleby and Kelly JJ also found that a control order placed on Finks Motorcycle Club member Donald Hudson in May was 'void and of no effect' (see [168]; Dowdell 2009b). They found that it was not necessary to decide whether s 10(1), which provides that the Attorney-General may make a declaration, is a valid law; nor was it necessary to decide whether a declaration by the Attorney-General affecting the Finks club was void and of no effect. The Court also ordered costs against the Rann Government (Lower 2009b).

The SA Attorney-General, Michael Atkinson, described the ruling as a 'minor setback' and 'temporary win for organised crime' but said that the Rann Government was 'in control and we will amend the legislation as necessary to continue the war' (Lower 2009a: np). In a media release following the decision in Totani's case, the Attorney-General noted that the decision did not prevent the Police Commissioner from making applications to obtain control orders under s 14(2)(b), as the decision only affects ss 14(1) and 14(2)(a). On 21 October, it was reported that the SA Government had sought special leave in the High Court to appeal the Full Court's decision. The Attorney-General said he expected states with similar legislation to join the High Court action (Nason 2009) and that he had been advised by the Solicitor General that the appeal 'would have reasonable prospects of success' (Statham 2009: np). In February 2010, the High Court granted special leave to the SA Government to appeal against the decision, with the appeal expected to be heard in the middle of 2010 (Atkinson 2010).

In December 2009, it was reported that the Police Commissioner, Mal Hyde, had applied to the Attorney-General to have another motorcycle group, the Rebels, identified as a declared organisation under the Act. The issue was to be open for public submission until February 2010 (Robertson 2009).

Finally, it should be noted that on 30 October 2009 the South Australian Legislative Council passed the *Serious and Organised Crime (Unexplained Wealth) Act 2009*, which 'targets members of serious

organised criminal gangs by forcing them to explain the source of specified assets, suspected of being acquired through illegal means (Atkinson 2009d). The legislation has not yet come into effect and will expire after 10 years.

## New South Wales

In 2006, the NSW Government passed the *Crimes Legislation Amendment (Gangs) Act 2006*, making it the first Australian jurisdiction to legislate specific offences against criminal organisations (Schloenhardt 2008). The provisions make it an offence to participate in a criminal group, defined as three or more people who have as their objectives either to obtain material benefits from serious indictable offences or to commit serious violent offences. The Act also created power for the court to make a fortification removal order, in order to deal with OMCGs' heavily fortified premises.

In March 2009, Anthony Zervas was bludgeoned to death in a brawl at Sydney airport between members of the Comanchero and Hells Angels motorcycle clubs. Following the incident, on 2 April 2009, then NSW Premier Rees introduced the Crimes (Criminal Organisations Control) Bill 2009, which commenced on assent on 3 April 2009. The legislation is based substantially on the SA legislation and provides power for seeking to declare OMCGs as criminal organisations. The government has received advice from the Solicitor General indicating that any High Court challenge to the legislation would not be likely to be successful.

Under the Act, the Commissioner of Police may seek a declaration that a bikie gang is a declared criminal organisation (s 6). The test for making an order, under s 9(1), is the same as in South Australia, but the order is to be made by a judge, rather than by the Attorney General. The factors to be taken into account under s 9(2) are essentially the same as the South Australian legislation, but pertain in subsections (b) and (c) only to current or former members, not persons who associate, or have associated, with members of the organisation.

The judge is not required to provide reasons for making a declaration and the rules of evidence do not apply to the hearing of an application for a declaration (s 13). The applicable standard of proof is on the balance of probabilities (s 32). It is also worth noting that the declaration can be made in the absence of any of the affected members (s 9(3)).

Once the organisation is declared, the commissioner may then seek control orders from the Supreme Court in respect of one or more persons on the basis that they are members of a declared criminal organisation and there are sufficient grounds for making the order (Part 3). Unlike the SA legislation, the NSW Act only



provides that the court may make an order, not that it must do so (s 19). A comparison of further differences between the SA and NSW legislation is set out in the Government Report to the ACT Legislative Assembly (ACT Government 2009: Annexure C).

If an order is made, the controlled member is prohibited from associating with another controlled member of the organisation. The maximum penalty for such association is two years' imprisonment for a first offence and five years for subsequent offences (s 26). Unlike the SA model, which requires a pattern of association, a single instance will constitute an offence. As in South Australia, certain forms of associations are permissible, for example, between close family members (s 26(5)).

Section 27 provides that controlled members of declared criminal gangs will also be stripped of any licence for working in industries that are vulnerable to biker and organised crime infiltration, such as the security, tow truck, car repair and motor trading industries; they will also have to forfeit any firearms licence. Amendments to the *Criminal Assets Recovery Act 1990* also removed the potential for dishonest earnings, enabling the NSW Crime Commission to pursue people who participate in criminal groups, either knowingly or recklessly, regardless of whether they are a controlled member of a declared criminal organisation.

Like the SA legislation, the NSW Act is to be reviewed by the Attorney General (s 40), but there is no sunset clause on the life of the Act. In late April 2009, eight OMCGs, including the Rebels and the Finks, formed the United Motorcycle Council of NSW, which reportedly plans to challenge the NSW legislation and which asserts on its website that 'freedom to associate [is] every Australian's right' (<http://www.umcnsw.org> 2009: np).

On 13 May 2009, New South Wales passed further legislation dealing with OMCGs (*Criminal Organisations Legislation Amendment Act 2009*). In particular, the amending legislation creates a new offence of recruiting a person to be a member of a declared organisation, carrying a maximum penalty of five years imprisonment (s 26A *Crimes (Criminal Organisations Control) Act 2009*). In the second reading speech, it was noted by the Parliamentary Secretary that:

Police have evidence that a number of youth gangs are being used by some criminal organisations to 'feed' their gangs with members. We also know that some of the most violent disputes between clubs are where members of one gang offer inducements for members of other gangs to 'patch' over and join their organisation. The offence will help stamp out these practices by deterring recruitment activity,

the poaching of members, and the associated violence. (Sharpe 2009: 15143).

The amendments also give power to the police to share confidential criminal intelligence concerning associates of declared criminal organisation members with high-risk industry regulators. Industry licences to associates, who act as 'front people', will be refused or cancelled if the regulator believes improper conduct to further criminal activity is likely to occur. In addition, the *Surveillance Devices Act 2007* was amended to authorise the use of intelligence obtained through a surveillance warrant to be used in proceedings to declare a gang or place a control order on a gang member (Hatzistergos 2009).

Further amendments were made in November 2009 to clarify that control orders may be issued against persons who are, or purport to be, former members of a particular declared organisation but have an ongoing involvement with the organisation and its activities (see *Crimes (Criminal Organisations Control) Act 2009*, s 19(1)(a)(ii)). These amendments also created a new association offence for controlled members who associate with other controlled members on three or more occasions within a three month period (s 26(1A)) and an offence of failing to disclose identity in accordance with the new powers (s 35A). The amendments also grant additional police powers to request the identity of persons reasonably suspected of being someone on whom a control order must be served and to require them to remain at a place for two hours in order to effect service (s 16(6)); and or for the purpose of enforcing the association offence (s 26(7A)).

The legislation has been the subject of critique (Cowdery 2009; Loughnan 2009; Schloenhardt 2009). It was reported in late September 2009 that no members had been proscribed under the legislation (Clennell 2009a), although there have been reports that the police intended to use the legislation 'in the new year' (Clennell 2009b: np). In addition, the police strike force established after the Sydney airport incident, Strike Force Raptor, has been extended until at least February 2010. In its first four months of operation, the strike force produced 317 arrests and 619 charges laid (Kelly 2009). The NSW Attorney-General, John Hatzistergos, is reported to have said the decision in the SA case of Totani would not affect the NSW laws (Lower 2009a), as the NSW law differs from SA's in key respects, especially in respect of judicial discretion (Clennell 2009a).

## Western Australia

Western Australia first introduced legislation targeting OMCGs in 2001, purporting to create 'the toughest laws in Australia for combating the sinister and

complex activities of criminal gangs' (Gallop 2001: 5038). The *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* came into effect in July 2002 and sought to facilitate the investigation of criminal activity and provide for the removal or modification of certain fortifications and other security measures. The Act was subsequently repealed, but similar provisions are now contained in Part 4, Division 6 of the *Corruption and Crime Commission Act 2003*. The validity of these provisions was upheld by the High Court in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4.

One of the key purposes of the *Corruption and Crime Commission Act 2003* is 'to combat and reduce the incidence of organised crime' (s 7A), which is achieved through the Corruption and Crime Commission (CCC) created by the Act. The CCC can grant the Commissioner of Police exceptional powers to investigate organised crime but it has recently been reported that 'in more than five years...the police did not seek the CCC's help to bust open the bikie gangs' (Murray 2009: np). Jim McGinty, who was the Attorney General at the time the 2003 laws were introduced, recently expressed concern about the legislation's effectiveness, noting that

toughening the law is fine at a political, rhetorical level...[but] our experience in Western Australia has shown that they haven't been used and therefore have not been effective (Edwards 2009: np).

In November 2008, the newly elected WA Government announced 'a multi-million dollar fighting fund to combat outlaw bikie gangs and other organised crime' (Porter & Johnson 2008: np). In the wake of gang violence in early 2009, the Police Minister and the Attorney General have both expressed interest in the SA model for dealing with OMCGs, but have also indicated that the government is awaiting the results of the proposed legal challenge to those laws (Johnson 2009a; Murray 2009; Porter 2009). In June 2009, it was reported that the WA Government would 'introduce the toughest anti-bikie and organised crime laws in the country, with sweeping new powers covering property searches, arrest, undercover operations and surveillance delivering unprecedented authority to state police' (Barrass 2009: np). On 18 June, the Minister for Police, Rob Johnson, told the Legislative Assembly that he and the Attorney-General were developing two or three tranches of legislation, the first of which would provide the Commissioner of Police with the authority to apply for a declaration from a Supreme Court judge to make an organised gang a declared organisation (Dixon 2009; Johnson 2009b). The Attorney-General, Christian Porter, recently commented that Western Australia would analyse the decision in Totani's case when drafting its laws (Lower 2009a).

## Queensland

The Criminal Organisation Bill 2009 was introduced into Parliament on 29 October. When introducing the Bill, the Premier, Anna Bligh, and Attorney-General, Cameron Dick, noted that

the government had taken the time to ensure the Bill represented the most robust legislation in the country, striking the proper balance between the rights of individuals and the safety of the community

adding that although the Bill is

tough...[it] explicitly provides that it is not the Parliament's intention that powers under the Act be exercised in a way that diminish the freedom of people to participate in advocacy, protests or industrial action (Bligh & Dick 2009: np).

In response to the proposed legislation, members of 17 clubs, including 14 OMCGs and two Christian motorcycle clubs, have formed the United Motorcycle Council of Queensland, which may join together to fund a legal challenge to the proposed new laws (Ironsides 2009).

The legislation was assented to on 3 December but has not yet come into force. The key provisions:

- enable the Police Commissioner to make an application to the Supreme Court to declare an organisation a criminal organisation;
- provide that the Supreme Court can make such a declaration where it is satisfied members of the organisation meet for the purpose of engaging in, or conspiring to engage in, serious criminal activity and the organisation is an unacceptable risk to the safety, order or welfare of the community;
- empower the Police Commissioner to make further applications to the Supreme Court in respect of a declared organisation that control orders be made against individual members of a criminal organisation;
- provide for public safety and fortification removal orders to be made; and
- create a new offence of contravening a control order, which carries a maximum penalty of three years' jail for the first offence and five years' jail for subsequent offences.

The Act also creates a number of criminal offences for breaching various civil orders and offences are created aimed at ensuring the confidentiality of 'criminal intelligence'. In addition, the Act amends a number of existing offences in the Criminal Code in order to protect those involved in criminal organisation prosecutions and hearings from threats and intimidation. Finally, the Act creates a Criminal Organisation Public Interest Monitor—a retired judge

or independent lawyer—who will monitor, appear on and make submissions in relation to applications under the Bill and who will

represent the public interest by assisting the court during application hearings to test the validity of applications, particularly where the respondent cannot be present due to the use of covert Intelligence (Bligh & Dick 2009: np).

## Victoria

Victoria has stated that it will not introduce new legislation to criminalise motorcycle gangs, arguing that it already has tough laws for dealing with organised crime (Hulls 2009). Victoria has implemented an extensive suite of legislative powers to ensure that Victoria Police has the necessary powers to investigate organised crime, not just OMCGs. In accordance with the agreement from the Leaders' Summit on Terrorism and Multi-jurisdictional Crime in 2002, Victoria has implemented:

- the *Crimes (Controlled Operations) Act 2004*, which enables police to engage in activities which may otherwise be illegal, while undertaking 'undercover' duties;
- the *Surveillance Devices (Amendment) Act 2004*, which provides police with powers in relation to the installation, use, maintenance and retrieval of surveillance devices for the purposes of investigating serious and organised crime;
- the *Crimes (Assumed Identities) Act 2004*, which allows for the lawful acquisition and use of assumed identities to facilitate investigations and intelligence gathering; and
- the *Evidence (Witness Identity Protection) Act 2004*, which provides for the protection of the identity of covert operatives who may be required to give evidence.

Victoria has also enacted the *Major Crimes (Investigative Powers) Act 2004*, which established a coercive questioning regime for organised crime. In combination with Victoria's asset confiscation regime, which enables assets that have been used in or derived from criminal activity to be confiscated, thereby removing the profit motive for criminality, these powers enable police to gather intelligence to target organised criminal activity and to identify suspects for prosecution.

## Tasmania

In 2007, Tasmania passed the *Police Offences Amendment Act 2007* to empower the Commissioner of Police to apply to a court for authority to remove or

modify any heavy fortifications of the clubhouses of criminal organisations, including OMCGs.

There does not appear to be any intention to introduce legislation criminalising OMCGs, with the Attorney General noting that 'we are fortunate in Tasmania not to have the same problems with organised crime' (Giddings 2009: np). She acknowledged, however, the need for collaboration to 'ensure that there can be no safe haven for people involved in such illegal activities anywhere in Australia' (Giddings 2009: np). The ACT Government noted in its recent report that Tasmania agreed to the SCAG resolution and to that effect has undertaken to examine its legislation dealing with organised crime (see ACT Government 2009: 20).

## Northern Territory

In 2006, the Northern Territory passed the *Justice Legislation (Group Criminal Activities) Act 2006*, which included association restrictions for identified gang members, and were reported by the Attorney-General to have formed the basis for the subsequent South Australian legislation (Cavanagh 2009).

In October 2009, the Northern Territory passed the *Serious Crime Control Act 2009*. The legislation allows for the making of declarations about criminal organisations, control orders, public safety orders and fortification removal orders. As in New South Wales, the Police Commissioner may apply to an eligible judge for a declaration. The Attorney-General, Delia Lawrie, referred to advice that the decision in Totani's case 'would not apply to our legislation', adding that the NT laws

include checks and balances to ensure new powers and responsibilities granted to police, the courts and judicial officers, are used appropriately and responsibly in targeting serious outlaw gangs and criminals (Lawrie 2009: 1)

It was previously reported that the Attorney-General had received advice from the Solicitor-General that the legislation was 'sound and legal' (Langford 2009: np).

## Australian Capital Territory

The Australian Capital Territory does not have OMCG-specific legislation, but there are a number of legislative measures used to combat serious organised crime groups and their activities, including the *Confiscation of Criminal Assets Act 2003*, non-association orders under the *Crimes (Sentencing) Act 2005* and serious drug offence provisions under the *Criminal Code 2002*.

The Australian Capital Territory has agreed to implement the model Cross Border Investigations law;



the first phase is already in place with the *Crimes (Controlled Operations) Act 2008* (ACT) and the second phase was recently implemented with the passage of the *Crimes (Assumed Identities) Act 2009* (ACT), which will come into effect by March 2010. The Australian Capital Territory is currently working towards enacting the balance of these laws and intends to extend the model laws to provide for both local and cross-border investigations. Legislation relating to witness protection and surveillance devices will follow to give full effect to the Cross Border Investigations model laws in the Australian Capital Territory. In addition, the Attorney General has announced that the ACT Government will be moving to introduce the offences of *affray* and *recruiting a person to engage in criminal activity*.

The Government Report to the ACT Legislative Assembly, Serious and Organised Crime Groups and Activities, was tabled in the ACT Legislative Assembly in June 2009 (ACT Government 2009). The report proposes a range of legislative reforms to tackle unexplained wealth, conspiracy and joint commission of criminal offences. The report notes that legislative regimes such as those enacted in New South Wales and South Australia would, if enacted in the Australian Capital Territory, engage a number of rights under the *Human Rights Act 2004* (ACT), including the right to:

- freedom of association;
- freedom of assembly;
- a fair trial;
- examine prosecution witnesses;
- privacy; and
- not have one's reputation unlawfully attacked (ACT Government 2009: 25).

In July 2009, the Australian Federal Police union called on the ACT Government to introduce laws targeting organised crime in line with some other jurisdictions, but the Attorney-General, Simon Corbell, said the government would not consider the 'extreme approach' adopted by New South Wales and South Australia, noting that the union's advice ran counter to that given by ACT Policing (Stockman 2009). More recently, he commented that the decision in *Totani's* case, which ruled that parts of South Australia's anti-bikie laws were invalid, vindicated the ACT Government's decision to avoid enacting legislation of this nature, adding that the decision 'highlights the fact that there are real problems with the legislative approach adopted in South Australia and the Supreme Court has recognised that' (Larkin 2009: np).

## National response

On 16 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a united response to OMCGs as organised crime requires

a nationally-coordinated response by all jurisdictions. It was noted that the Australian Government will consider introducing a package of legislative reforms to combat organised crime, including measures to:

- strengthen criminal asset confiscation, including unexplained wealth provisions;
- prevent consorting, subject to constitutional powers and to the extent practical and effective;
- enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection;
- facilitate greater access to telecommunication interception for criminal organisation offences; and
- address the joint commission of criminal offences (SCAG 2009a: np).

The ministers agreed that the states and territories should consider introducing the following legislative measures, where they have not already done so:

- measures that permit coercive questioning of individuals to assist with investigation of organised crime offences;
- consorting or similar provisions that prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation;
- measures that enable police to engage in controlled operations and enable the use of assumed identities to facilitate investigations and intelligence gathering;
- legislation to permit the use of surveillance devices for the purposes of investigating serious and organised crime;
- witness protection legislation and asset confiscation legislation to enable a court to restrain a person's tainted assets; and
- model cross-border investigative powers for controlled operations, assumed identities, witness identity protection and surveillance devices.

In addition, ministers agreed to:

- introduce arrangements to ensure cooperation between jurisdictions in relation to organised criminal activity;
- coordinate law enforcement efforts through developing shared priorities, facilitating improved information and intelligence sharing and coordinating investigative and target development activities; and
- establish a SCAG Officers' Group to undertake work on legislative, interoperability and information sharing measures in consultation with Ministerial Council for Police and Emergency Management-Police officers (SCAG 2009a).

The Australian Government Attorney-General said he was confident the new national approach 'will significantly curtail organised crime, including bikie crime' (Boxsell 2009: np). These developments,



especially in respect of the proposed model cross-border powers, build on the 2002 Leaders' Summit on Terrorism and Multi-Jurisdictional Crime, which marked the beginning of a new era of cooperation between governments in the fight against crime (Williams 2002). The issue of organised crime was also on the agenda for the SCAG meeting in August 2009 and resulted in the following communiqué:

*National response to organised crime*

Ministers agreed to arrangements to support the comprehensive national response to organised crime discussed by the Commonwealth, States and Territories at SCAG in April 2009. These arrangements will ensure a coordinated national effort to effectively prevent, investigate and prosecute organised crime activities and target the proceeds of organised criminal groups (SCAG 2009b: 3).

The proposals agreed to by SCAG will be informed by the findings of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) inquiry into the legislative arrangements to outlaw serious and organised crime groups, which released its report in August 2009. The report provides an overview of serious and organised crime in Australia, arguing that there is a need to be able to define and quantify serious and organised crime in order to develop appropriate responses to it. In that context, the report discusses whether OMCGs are inherently criminal organisations or whether it is individual members within OMCGs who engage in criminal activities. Further, it provides:

- an overview of existing legislative approaches to combat serious and organised crime in each Australian jurisdiction;
- consideration of various legislative models aimed at prohibiting organised criminals from associating with each other; and
- an assessment of measures for the confiscation of proceeds of crime, including the emergence of unexplained wealth provisions.

It is concluded in the report that

Australia must take a coordinated and holistic approach to tackling serious and organised crime and that strong legislative arrangements in themselves are just one part of a suite of tools and approaches (PJC-ACC 2009: [1.22]).

The role of the police in this context should also be considered. In June 2009, the WA Police Minister, Rob Johnson, chaired a police ministerial council meeting, where it was agreed that uniform anti-bikie laws would be pursued (two more jurisdictions sign up for bikie-gang laws 2009). On 22 October 2009, the Australian Federal Police Association (AFPA) was reported as calling for all jurisdictions to have 'similar...anti-

association laws', citing examples of 'cases that could have been broken had the laws been in place' (Kemp 2009: np). AFPA government relations director, Chris Steel, said the proposal was 'slightly different' from the South Australian model because a gang would not be banned but participation within the group for criminal activity would be. He added that the laws would best help with transnational organised crime and international money laundering (Kemp 2009).

The need for interagency cooperation is acknowledged in the Commonwealth Organised Crime Strategic Framework, which was recently finalised by the Australian Government. The Attorney-General stated at the recent inaugural meeting of the Quintet of Attorneys General, which comprises the United Kingdom, United States, Australia, Canada and New Zealand, that the Framework

will aim to achieve a whole of government approach to combating organised crime by drawing together combined criminal intelligence and law enforcement capacity and prioritising operation target areas and groups (McClelland 2009: np).

The key elements of the Framework are:

- development of an organised crime threat assessment;
- development of an organised crime response plan; and
- implementation of multi-agency responses (Australian Government 2009).

Five capabilities are identified as necessary to the successful implementation of the strategy:

- intelligence, information sharing and interoperability;
- targeting the criminal economy;
- investigation, prosecution and offender management;
- preventative partnerships with industry and the community; and
- international, domestic and Commonwealth partnerships (Australian Government 2009: 12).

The Framework lists 25 agencies, including the Australian Institute of Criminology, as responsible for responding to organised crime.

Finally, the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) was introduced into the Commonwealth House of Representatives on 24 June 2009. The Senate Legal and Constitutional Affairs Committee (SLCAC) released its report on the Bill on 17 September 2009, in which it made a number of recommendations for amendments to the Bill and proposed that, subject to these recommendations, the Bill be passed (SLCAC 2009a: Recommendation 13).

On 17 September 2009, the Senate also referred the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth Bill (No 2)) to the SLCAC. The Commonwealth Bill (No 2) implements legislative aspects of the national response to organised crime that were not implemented by the first Bill, and includes additional measures to strengthen existing laws to more effectively prevent, investigate and prosecute organised crime activity, and target the proceeds of organised criminal groups. The SLCAC reported on the Bill on 16 November 2009 and made six relatively minor recommendations and, again, recommended that the legislation be passed subject to these recommendations (SLCAC 2009b: Recommendation 7). Both Bills were assented to on 19 February 2010. The majority of Acts came into effect on assent, with the balance to come into effect on 19 May 2010.

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This report reflects the law as at 25 February 2010 and the law in this area is subject to frequent change. The report is not intended to constitute legal advice, which should be sought before acting or relying on the content of this report.